

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
August 14, 2007 Session

**HUGH ANDREW NICELY v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Robertson County  
No. 8530     John H. Gasaway, III, Judge**

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**No. M2006-01892-CCA-R3-PC - Filed February 22, 2008**

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The State appeals the Robertson County Circuit Court's granting the petition for post-conviction relief from the convictions for rape of a child, aggravated rape, and aggravated sexual battery and effective fifty-three-year sentence. On appeal, the State argues that the post-conviction court erred in finding that the petitioner received ineffective assistance of counsel at trial. Following our review, we conclude that the post-conviction court erred in granting the petition for post-conviction relief and reverse the judgment of the court. The petitioner is to be returned to the custody of the Tennessee Department of Correction.

**Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed**

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Dent Morriss, Assistant District Attorney General, for the appellant, State of Tennessee.

Robert R. Kurtz (on appeal) and Kenneth Irvine (at hearing), Knoxville, Tennessee, for the appellee, Hugh Andrew Nicely.

**OPINION**

**FACTS**

In 1994, the petitioner, Hugh Andrew Nicely, was convicted of seven counts of aggravated rape, one count of aggravated sexual battery, and one count of child rape and received an effective sentence of fifty-three years. On direct appeal, this court outlined the facts underlying the petitioner's convictions:

The victim was twelve years old at the time of trial. She was born in 1982, and the [petitioner] was her stepfather. She testified that when she was six years old, the [petitioner] instructed her to run out of the house if he ever came into her bedroom "to do something." Shortly thereafter, the [petitioner] entered the victim's bedroom and instructed her to remove her clothing. She removed everything but her shirt. She stated that the [petitioner] undressed. He then placed her blanket over her face and inserted his penis into her vagina. She stated that the penetration hurt and made her cry.

The victim testified that when she was in the second grade, or seven years old, the [petitioner] again "put his privates in [her]." That summer, the [petitioner] took her into his bedroom after her mother had left for work. She stated that if she cried, he would hit her and tell her to "shut up."

The victim next testified to sexual assaults occurring during her third grade year. She stated that when her mother was home, the [petitioner] would take her into the woods. The [petitioner] would place a blanket on top of the car. She stated the [petitioner] would make her undress and have intercourse with him. Following the sexual act, they would go shopping. She could not recall how many times the [petitioner] sexually penetrated her during that time frame. She did, however, testify that it happened "a lot."

The victim next testified that when she was nine years old, she and the [petitioner] took showers together. She also stated that he would approach her after she showered but before she had time to get dressed. She stated that he would then "take me into his room . . . and put his privates in me." She stated that this happened on more than one occasion. She stated that he raped her vaginally and anally. She also stated that she rubbed his privates and "white stuff came out."

The victim testified that the [petitioner] took naked pictures of her. She stated that he kept them in his drawer. She testified that later he cut up the pictures "and threw them away . . . in the garbage can."

The victim testified that in 1992 she had head lice. She stated that after she washed her hair with the lice shampoo, the [petitioner] took her into his bedroom. He then "put his privates in [her]."

Louise Head testified. She worked at the victim's day care. She described the victim as being "real shy" and "timid." She stated that the victim isolated herself and had a low self worth. When she complimented the victim, she stated the victim would respond "I'm ugly." She further stated that the victim pulled away from her whenever she tried to communicate with her.

Ms. Head testified that when the victim was around six years old, she had told day care workers that the [petitioner] sexually abused her. Ms. Head informed the victim's mother of the sexual abuse allegations. Ms. Head stated that the mother wrote the allegations off as lies. Approximately four years later, in 1992, the allegations resurfaced. The 1992 allegations were brought to the attention of the police.

The victim was interviewed and examined at a child sex abuse clinic. Medical examinations revealed physiological findings consistent with the victim's allegations of abuse. The victim had a damaged hymen. Medical testimony also established that vaginal penile penetration was not only possible, but was consistent with their findings.

State v. Hugh Nicely, No. 01C01-9506-CC-00160, 1996 WL 233985, at \*1-2 (Tenn. Crim. App. May 9, 1996), perm. to appeal denied (Tenn. Oct. 7, 1996). This court reversed four of the convictions and remanded for a new trial,<sup>1</sup> but the petitioner's effective sentence remained unchanged. Id. at \*5.

The petition for post-conviction relief was filed on October 3, 1997, and followed by an amended petition on August 21, 2003, alleging, *inter alia*, that (1) trial counsel was ineffective in numerous ways, including failing to call an expert witness to refute the State's medical evidence; and (2) trial counsel had a conflict of interest based on his prior representation of a prosecution witness.

At the May 4-5, 2006, evidentiary hearing, Dr. Matthew Seibel, testifying on behalf of the petitioner, said that he was board certified in pediatrics and had testified as an expert witness in hundreds of cases of which "98 plus percent of the time" he was a prosecution witness. He said that he had reviewed the victim's medical records and photographs taken during her examination at Our Kids Clinic ("the Clinic"). He said that the photographs appeared to have been taken through a magnified colposcope. As to the two photographs taken during the victim's rectal examination, Dr. Seibel said there appeared to be "a little hypertrophy, or extra tissue, on one side" but said it had no medical significance. As to the photographs taken during the victim's vaginal examination, Dr. Seibel noted some irregularity, which he described as a "small crease," of the hymen at the six o'clock position but said the hymen was present. Dr. Seibel said that, based solely on the physical examination, he could not conclude whether penetration had occurred but acknowledged that the irregularity in the victim's hymen was consistent with a penetrating injury history. Dr. Seibel said that although he disagreed with Julie Rosof-Williams' finding that the victim's hymen was absent at the six o'clock position, he could not disprove the history taken from the victim, which was "the most important part" in an alleged sexual abuse case. He acknowledged that, based upon the history

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<sup>1</sup> According to the post-conviction court's order granting the petition, the State did not retry the petitioner on the remanded counts.

given by the victim and the photographs and records he reviewed, had he been called to testify at the trial he would have agreed with the diagnosis of sexual abuse.

Julie Rosof-Williams, the family nurse practitioner at Our Kids Clinic who examined the victim and testified at the trial, said that she had performed thousands of examinations in child sexual abuse cases. She identified the victim's medical records, which included her handwritten notation denoting the absence of the hymen at the six o'clock position, and maintained that the victim's hymen was not present at that position. She disagreed with Dr. Seibel's finding of hymenal tissue at the six o'clock position, saying that the tissue he observed on the photographs was vaginal tissue. She said that her conclusion that the victim had sustained a penetrating vaginal injury was based on the physical examination. On cross-examination, Rosof-Williams acknowledged that the victim's hymen was present at the five and seven o'clock positions but said it was completely absent at the six o'clock position.

Dr. Donald Arnold testified that, as the medical consultant for Our Kids Clinic, he supervised the work of the nurse practitioners. Dr. Arnold said that Rosof-Williams had "extensive experience [and] training" and that a nationally recognized expert visited the Clinic every two to three years to survey the level of skill of the examinations, with the Clinic receiving "excellent ratings" and no criticism of the quality of the examinations being performed. He said that he had reviewed the photographs taken during the victim's examination and that there appeared to be a disruption of the hymen between the five thirty and six o'clock position, which was an abnormal finding. He said that, based upon his training and experience, the absence of the hymen at the six o'clock position indicated penetrating trauma. In Dr. Arnold's opinion, the "crease" described by Dr. Seibel represented a transection<sup>2</sup> of the hymen at the six o'clock position. On cross-examination, Dr. Arnold acknowledged that he first became involved with the Clinic in 2003 and had no involvement with the Clinic at the time of the victim's examination.

The petitioner testified that his first trial resulted in a hung jury and that he was convicted in the second trial, with the only significant difference between the two trials being the admission of the photographs of the victim's examination. He said he was represented by the same attorney at both trials. He said that he and trial counsel discussed hiring a medical expert to challenge the work done by Our Kids Clinic, but counsel "had his opinion, [the petitioner] had [his], and that's as far as it went." During the second trial, the petitioner learned that trial counsel had previously represented Detective Joann Gregory but did not know the nature of the case. He remembered an objection being made to trial counsel's line of questioning because counsel was trying to use knowledge he had gained during his representation of Detective Gregory. Several years later, the petitioner learned that the case involved the "illegal strip search of a minor." The petitioner said that counsel never discussed any potential conflict of interest with him.

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<sup>2</sup>Dr. Arnold defined a transection as "a break in the hymenal membrane that extends all the way to where it should be attaching to the wall, or to the vestibule." In response to questioning from the court, Dr. Arnold further explained that it would be accurate to characterize a transection as a tear.

The petitioner recalled that, at the beginning of the first trial, the State made a plea offer of eight years at thirty percent which he rejected. The State subsequently made another offer of one year in the county jail and one year probation. The petitioner said he would have accepted that offer if he could have served the sentence in Jefferson County, "but no such deal was ever worked out."

On cross-examination, the petitioner acknowledged that Dr. Eric Engum, a psychologist, testified at trial that the petitioner did not fit the profile of a person who would commit the type of crimes involved in this case. The petitioner said he told trial counsel that if he had done the acts of which he had been accused, he would have lacerated the victim due to the size of his penis. He said that Dr. Steven Miniatt testified at trial as to the dimensions of the petitioner's penis in support of the defense's claim of impossibility.

Trial counsel testified that he was licensed to practice law in 1981 and was hired by the petitioner's family to represent him. He said he was paid for the first trial, but not the second, and the petitioner's family did not have the resources to hire a private investigator or jury consultant. He said that the petitioner had always maintained his innocence and told counsel it was impossible for him to have raped the victim because his penis was too large. Counsel said that the defense presented two expert witnesses at trial, Dr. Engum, who testified that the petitioner did not fit the profile of a child sexual abuser, and Dr. Miniatt, who testified as to the size of the petitioner's penis.

As to the conflict of interest issue, trial counsel testified that while he was the city attorney for Springfield, a federal lawsuit was filed against the city by the Timberlake family alleging an improper body cavity search of a member of that family by Detective Joann Gregory, who also was the lead detective in the petitioner's case. Counsel recalled that his involvement in the federal case was "very limited" and mainly consisted of his delivering a summons to the insurance company for the city which contracted with a law firm to do the work on the case. Counsel did not recall doing any actual work on the case himself or representing Detective Gregory individually. He said he did not remember "learning anything that was confidential that [he] could use against [Detective Gregory] in [the petitioner's] trial." He denied that his involvement in the federal case affected his representation of the petitioner. Counsel acknowledged that he did not obtain a waiver from the petitioner or Detective Gregory as to the possible conflict of interest.

Trial counsel said that the petitioner rejected the State's plea offer of one year in the Robertson County Jail followed by one year of supervised probation. Counsel had another attorney, Jeff Walker, meet with the petitioner to try to convince him to settle the case. Counsel said that the petitioner "[a]bsolutely" had adequate time to consider the settlement offers made by the State. He identified two letters dated October 12, 1992, addressed to the petitioner and his wife from the Florida Department of Health and Rehabilitative Services stating that its investigation into an abuse report involving them was being closed without identifying anyone as an abuser.

Counsel said that he prepared the petitioner for trial and they had multiple telephone conversations between the first and second trials, explaining this arrangement was necessary because he lived in Middle Tennessee and the petitioner lived in East Tennessee. Asked if he believed Dr.

Seibel's testimony would have affected the outcome of the trial, counsel said that it was "hard to know" but that Dr. Seibel's testimony about the victim's hymen being present at the six o'clock position would have been valuable. Counsel said he tried to prevent Rosof-Williams from testifying at trial by filing a motion to bar her testimony and an extraordinary appeal but was unsuccessful. He said that he vigorously attacked her testimony at trial and that Dr. Robert Brayden testified, essentially confirming Rosof-Williams' testimony. He said that both he and the State believed that the petitioner could be exonerated if Rosof-Williams' testimony was undermined. Counsel acknowledged that he did not have a medical expert review the photographs taken during the victim's physical examination.

Attorney Jeff Walker testified that, at the request of trial counsel, he met with the petitioner to offer his opinion about the State's plea offer. He advised the petitioner to accept the State's offer of one year at 100% followed by probation because he believed the likelihood of conviction was great.

At the conclusion of the hearing, the post-conviction court took the matter under advisement and, after receiving memoranda from the parties regarding the matters raised by the petition, entered a lengthy order finding that trial counsel had been deficient in his representation and that the petitioner had been prejudiced as a result. Accordingly, the court granted the petition for post-conviction relief, and the State appealed.

## **ANALYSIS**

The post-conviction court granted relief based upon its findings that trial counsel was deficient in not presenting at trial an expert witness, such as Dr. Seibel, who testified at the evidentiary hearing, to refute the conclusions of Nurse Rosof-Williams and that the petitioner was prejudiced as a result. The court made no findings with respect to the petitioner's claims that trial counsel also was ineffective by not revealing he had a conflict because of his prior involvement in a lawsuit in which one of the State's witnesses was a defendant and by not filing a motion to dismiss two counts of the indictment because those counts referred to a statute which was not in effect when the petitioner allegedly committed the offenses in those counts. Since these claims require only determinations of law and not findings of credibility, we will determine their validity. As to the other claims, which the post-conviction court concluded were without merit, the petitioner did not appeal and, thus, this court will not review those rulings.

### **I. Ineffective Assistance of Counsel**

#### **A. Applicable Law**

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard

in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

By statute in Tennessee, the petitioner at a post-conviction relief hearing has the burden of proving the allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). A petition based on ineffective assistance of counsel is a single ground for relief,

therefore all factual allegations must be presented in one claim. See Tenn. Code Ann. § 40-30-206(d).

We note that when post-conviction proceedings have included a full evidentiary hearing, as was true in this case, the trial judge's findings of fact and conclusions of law are given the effect and weight of a jury verdict, and this court is "bound by the trial judge's findings of fact unless we conclude that the evidence contained in the record preponderates against the judgment entered in the cause." Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). As explained in State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999), "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

### **B. Trial Counsel's Failure to Retain Medical Expert**

The State argues that the post-conviction court erred in concluding that trial counsel was defective for failing to retain a medical expert to counter the testimony of Nurse Rosof-Williams and that the petitioner was prejudiced as a result. In order to address this argument, we must review in detail the relevant evidentiary hearing testimony of Nurse Rosof-Williams and Dr. Seibel, the expert witness who testified on the petitioner's behalf.

As the post-conviction court correctly noted, Dr. Seibel testified, contrary to the conclusion of Nurse Rosof-Williams, that there was a "small crease" of the victim's hymen at the six o'clock position but the hymen still was present. Dr. Seibel was unable to conclude, however, that this finding meant the victim had not been penetrated:

Q. Okay. Taking all these photographs together, if this patient had presented to you would you be able to make a finding of penetration based solely on the examination?

A. Based solely on the examination I would have called this an equivocal exam. I do have some questions about the posterior area, or the area at 6:00, but it's there and it's present, and this is an exam which is equivocal in nature.

Q. Okay. Explain exactly what you mean by equivocal.

A. I can't say one way or another based on the physical examination alone.

Additionally, Dr. Seibel testified that, even though he disagreed with the interpretations of the photographs by Nurse Rosof-Williams and Dr. Brayden, he could not dispute the victim's statement that she had been sexually abused:

Q. When you have these photographs, because you're finding something different than the nurse, that you're finding that the hymen is present at 6:00, can you then by that disprove the history taken from the child?

A. Absolutely not, sir.

Q. Is it ever possible to do that with these types of findings?

A. No, sir.

During his cross-examination, Dr. Seibel explained that, based upon the history given by the victim and the photographs which he had examined in preparation for the post-conviction hearing, his diagnosis would have been consistent with those of the State's witnesses that the victim had been sexually abused:

Q. Okay. And if you had the history given by the child in this case coupled with the photographs that you've just been testifying about, would that cause you to have concerns about this child having been sexually abused?

A. Well, as I said, sir, my diagnosis would not have been any different.

Q. You would have not disagreed with the diagnosis of sex abuse?

A. No, sir.

Further, Dr. Seibel testified that the irregularity he observed in the victim's hymenal tissue was consistent with a penetrating injury and that finding, in addition to the victim's history, would have caused him to have "concern" for her:

Q. Now, at 6:00 yet you have noticed that there is what you refer to as an irregularity?

A. Yes, sir.

Q. And that irregularity, you would admit[,] I believe, would be consistent with a penetrating injury?

A. A normal exam is consistent with a penetrating injury, sir.

Q. Can be, yes.

A. Yes, sir.

Q. You can have penetration and absolutely normal examination thereafter, and in fact that's more often the case than not; is that accurate, sir?

A. Correct, sir.

Q. So when you have a history given by the child I was sexually penetrated and you have this, what you have called, irregularity at 6:00, that would cause you as an examiner, a medical examiner, to have concern for that child; correct?

A. Well, the history would have caused me to have concern for that child, sir.

Q. Right.

A. The physical examination is as it is.

Q. And this irregularity is consistent with a penetrating injury history; correct?

A. Yes, sir.

The post-conviction court concluded that trial counsel was ineffective in not presenting at the trial the testimony of Dr. Seibel:

Based on trial counsel's testimony, this Court notes the vigorous representation he engaged in on behalf of the petitioner. As to the witnesses presented, trial counsel cross-examined extensively and took extraordinary efforts (including a Rule 10 Appeal) to exclude the testimony of the [S]tate's most potent witness – Nurse Rosof-Williams. However, the testimony from the evidentiary hearing revealed that all parties understood the only significant difference in the two trials was the introduction of the photos and their interpretation.

Had an expert such as Dr. Seibel been called as an expert witness, the jury would have had before it the credibility conflict between the victim and the petitioner

along with competing views as to scientific evidence from qualified expert witnesses. This expert testimony opinion would have included divergent views on interpretation of the photos/slides. This difference in opinion was not as to peripheral issues but went to the heart of the issue before the jury – did the victim’s vaginal area reveal penetration. In other words, this interpretation of the photos/slides went to the heart of the charges against the petitioner.

Having the benefit of comparing two almost identical trials, this Court can more easily analyze the effects of the photos/slides on the second trial of this case. Here, the only difference between the two trials was the introduction of the photographs/slides. Because the results of the trials changed from a deadlocked jury to convictions on all counts, the significance of the photographs/slides cannot be discounted in their importance and the effects of the photos and interpretation of the photos cannot be minimized. The Court finds, by clear and convincing evidence, that trial counsel should have presented expert testimony.

Additionally, the post-conviction court determined that the petitioner was prejudiced by the fact that this testimony was not presented to the jury:

However, the Court must go farther to determine if this omission resulted in prejudice to the [petitioner]. As cited above, the petitioner must demonstrate a reasonable probability that the result of the proceeding would have been different – that is, a probability sufficient to undermine confidence in the outcome. Because the interpretation of the photos went to the heart of the case and because their introduction more likely than not affected the verdict, the Court concludes, by clear and convincing evidence, that the petitioner has demonstrated sufficient prejudice to warrant relief.

We conclude that the evidence preponderates against the post-conviction court’s findings and conclusions in this regard. First, we disagree with the conclusions of the post-conviction court regarding the effect that Dr. Seibel’s testimony would have had at the trial. Certainly, his testimony regarding the intactness of the victim’s hymen differed from that of Nurse Rosof-Williams. However, whether her hymen was completely intact was not the ultimate issue. Dr. Seibel acknowledged that, even given his different interpretation of the photographs, he would not have disagreed that the victim had been sexually abused and that, in fact, the “irregularity” which he observed at the six o’clock position on the victim’s hymen was consistent with a penetrating injury. As to this, Dr. Seibel’s opinion would appear to have been helpful to the prosecution, not the defense. Additionally, we note that, although the petitioner presented expert proof at trial that the large size of his penis would have prevented his penetrating the victim, Dr. Seibel was not asked at the evidentiary hearing whether the irregularities he observed from the photographs of the victim’s vagina were consistent with penetration by a large penis. His response to this question could have undercut the petitioner’s claim of “impossibility.” Thus, we conclude that the petitioner failed to

establish that trial counsel either was ineffective in not presenting this testimony at trial or that the petitioner was prejudiced by the fact this did not occur.

## **II. Conflict of Interest**

The post-conviction court made no findings as to the claim that trial counsel had a conflict of interest in representing the petitioner because of counsel's having been involved, in some fashion, in the lawsuit against the City of Springfield and three law enforcement officers, including one who testified. Accordingly, and since factual findings are not required, we will determine whether the petitioner's claims have merit.

As we review this matter, we will set out the facts, gleaned from the transcript of the petitioner's second trial and testimony at the evidentiary hearing on the petition for post-conviction relief.

At the evidentiary hearing, the petitioner testified as to what he perceived to be a conflict of interest of trial counsel and explained how he first had learned of it: "I learned that there was a problem during the second trial. The prosecutor objected to a line of questioning and said that there was a possible conflict of interest and that [trial counsel] was using prior knowledge to obtain information." The petitioner said that, several years later, he learned more details of the matter, "that there was some sort of [an] illegal strip search of a minor, and [trial counsel] had been [Detective Joann Gregory's] attorney throughout that incident."

Trial counsel testified at the evidentiary hearing that, in his opinion, there had not been a conflict of interest in his representing the petitioner. He said that, as city attorney for Springfield, he had received a summons regarding a lawsuit and taken it to the insurance company for the City of Springfield. He recalled that the insurance company then had assigned the defense of the matter to one of the firms which represented the Tennessee Municipal League, and "they were the ones that did the primary work on the matter." As for whether he had participated in the defense of the lawsuit, trial counsel responded that he did not "have any recollection of a deposition or anything of that sort, so if [he] did [he did not] remember it."

Trial counsel said that he had not represented Detective Gregory, who testified for the State at the petitioner's trial, in the lawsuit against the City of Springfield and that, although other work had been possible, his only involvement was "carrying the complaint" to the city's insurance company.

Earlier in the proceedings at the petitioner's trial, the court had conducted a hearing as to whether the petitioner's trial counsel had a conflict in representing him, in view of counsel's involvement with a federal court lawsuit in which Detective Joann Gregory was a witness. At that hearing, Detective Gregory testified that she had been one of the defendants in a lawsuit filed in federal court following the arrest of Barbara Timberlake. Detective Gregory said that, because she was the sole female officer in the county at the time, she had been called to search Timberlake

following a vehicle stop near Springfield, Tennessee. Gregory said that she found a loaded .25 automatic in Timberlake's pants, and Timberlake later claimed that Gregory had raped her by inserting a finger in Timberlake's vagina. Gregory testified that "[a]t no time did I touch her and she also recanted that statement in her deposition. She said that I did not touch her." Gregory said that the lawsuit was settled for nuisance value, with the court making no findings of fact.

Additionally, during the hearing at the petitioner's trial, Detective Gregory said that the petitioner's trial counsel, as city attorney for Springfield, had participated in the defense of the suit, which had named as defendants, in addition to Gregory, two other police officers, as well as the director of the drug task force. The other lawyers involved in the defense were from the Nashville firm of Howell and Fisher. Gregory said that she could not remember which of the depositions in the case she had attended because they had occurred "about four or five years" earlier. As to the arrest of Timberlake, Detective Gregory said there had been "no deviation of established department policy." She said that the petitioner's trial counsel had contended that, as to the facts alleged in the lawsuit, none of the defendants, including the City of Springfield, had done anything wrong.

Chief Mike Wilhoit testified that he was employed by the Springfield Police Department, had conducted an administrative investigation of the incident alleged in the lawsuit, and concluded that the defendants neither did anything improper nor violated departmental policy. He said that, at the time of her arrest, Timberlake had a loaded pistol in her panties. According to Chief Wilhoit, the petitioner's trial counsel had represented the City of Springfield and the officers involved. He contended that neither the officers nor the city had done anything wrong.

Following the testimony at the hearing during the petitioner's trial, trial counsel explained to the court why he wished to present, at the jury-out hearing, the testimony regarding the prior civil suit:

Your Honor, I guess my position is that this is one of those troubling meddlesome things that lawyers have to face and deal with sometimes. We feel like, from our perspective in this particular case, that that was an indicator of – that the investigation could have been handled better. The other thing that I think is important, Your Honor, is because this incident did occur, because I was the City Attorney, I had no choice but to flex [sic] this out and get it on the record for [the petitioner's] sake. He had a right to hear this, to know what occurred, so that there wouldn't be any doubt in his mind about my loyalty to him, or that the ethical standards that I am trying to pursue in practicing law, and because I had been the City Attorney and am now representing him, it was a matter that needed to be on the record.

The trial court then ruled that any evidence regarding the civil lawsuit was irrelevant and could not be utilized in any fashion during the petitioner's trial:

Any evidence pertaining to this arrest and search is deemed by the Court to be irrelevant to this case, immaterial and not the proper subject for cross-examination on any basis that the Court is aware of, and so, it is a part of the record and the Court's ruling, hopefully, is clear as far as any mention of this. It is not to be mentioned. I don't see that it has any – I was looking through the rules. I don't see that it shows bias, there is not even any evidence that anything was done improperly. So, your motion is granted as far as the Motion in Limine.

It is unquestioned that “an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest.” State v. Thompson, 768 S.W.2d 239, 245 (Tenn. 1989). Usually, a conflict exists when one attorney represents two or more parties with divergent interest and the attorney is placed “in a position of divided loyalties.” State v. Tate, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995). However, a conflict “may exist anytime a lawyer cannot exercise his or her independent professional judgment free of ‘compromising influences and loyalties.’” State v. Culbreath, 30 S.W.3d 309, 315 (Tenn. 2000) (citing Tate, 925 S.W.2d at 554).

There has been a breach of the right to the effective assistance of counsel when counsel is unable to provide a “zealous representation . . . unfettered by a conflicting interest.” Thompson, 768 S.W.2d at 245. Because there is a breach of loyalty in cases where an attorney has a conflict of interest, prejudice is presumed. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). However, the petitioner must show that counsel “actively represented conflicting interests” before being entitled to this presumption, id. at 350; and the conflict must be actual and significant, not irrelevant or “merely hypothetical.” Terrence B. Smith v. State, No. W2004-02366-CCA-R3-PC, 2005 WL 2493475, at \*5 (Tenn. Crim. App. Oct. 7, 2005) (citations omitted), perm. to appeal denied (Tenn. Mar. 27, 2006). Generally, prejudice will only be presumed when the conflict of interest arises in cases involving representation of serial or codefendants. Id. (citation omitted).

Petitioner's trial counsel was city attorney for Springfield when a federal civil lawsuit was filed against Detective Gregory, two other police officers, and the director of the drug task force, as well as against the city, itself. Counsel accepted service, at least on behalf of the city, and delivered the summons and complaint to the insurance company for the city and, perhaps some or all of the other defendants. The lawsuit claimed that Detective Gregory had inserted her finger into the plaintiff's vagina during the search, before the plaintiff and her companion had been transported to jail, which yielded a loaded automatic pistol that the plaintiff had hidden in her panties. At her deposition, the plaintiff admitted that Detective Gregory had not inserted her finger into the plaintiff's vagina during the search, and later the suit was settled for “nuisance” value. The civil action had been resolved at some undisclosed time, but apparently several years, before the petitioner had been charged with the various offenses which resulted in his incarceration. There is no testimony identifying any confidential information which trial counsel might have received from Detective Gregory during his involvement in the civil matter and his representation of the petitioner in the criminal matter. As we shall discuss, legal authorities make clear that the petitioner failed to establish that his trial counsel had a conflict of interest.

In Enoch v. Gramley, 70 F.3d 1490, 1495 (7th Cir. 1995), a habeas corpus petitioner complained that he had been denied a fair trial because his attorney, four years earlier and in an unrelated matter, had represented a witness who testified for the government at the petitioner's trial. In his trial, the petitioner had been convicted of murder, attempted rape, and kidnapping of the victim, whose body was found in her apartment. The victim's body was found by a friend of hers, who entered her apartment through a window he had kicked in after she had not responded to her doorbell or numerous knocks on the door. Id. at 1494. The witness, who was a previous client of the petitioner's trial attorney, testified that, before entering the victim's apartment, he saw the defendant leaving her apartment building and was told by him that the victim was in her apartment. Before the petitioner's trial, his counsel had advised the court that he had represented this witness four years earlier in an unrelated matter and that counsel's representation of the petitioner in the case to be tried would not be affected by the earlier representation of the witness. The trial court found, given the circumstances, that counsel's prior representation of the witness would not constitute a conflict of interest in his representing the petitioner in his trial. Id. at 1495-96.

On appeal, the petitioner in Enoch, relying upon Cuyler v. Sullivan, argued that his trial counsel had an actual conflict of interest because of his prior representation of the prosecution witness. In assessing this argument, the court acknowledged the holding of Smith v. White, 815 F.2d 1401, 1405 (11th Cir.), cert. denied, 484 U.S. 863, 108 S. Ct. 181 (1987), as to the two scenarios which would support the petitioner's argument:

(1) [Where] "counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant, or (2) [where] counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case." In addition, either showing will merely allow a petitioner to proceed with his claim; one showing or the other is necessary, but not sufficient.

Enoch, 70 F.3d at 1496 (quoting Smith, 815 F.2d at 1405).

The court explained why the petitioner's argument was not persuasive:

Here, however, the entirely separate crimes for which [defense counsel] represented [the witness] and then Enoch were four years apart, and none of the relevant people involved had cross-cutting relationships. Unlike in Church, where Church and the other client knew each other, the other robbery suspects, and something about the planning of the robbery, here there is nothing to suggest that either [the witness] or [the victim] had ever even seen Enoch until Enoch stopped by [the victim's] apartment (when [the witness] was there) the day before the murder. And there is no alleged factual relationship between [the witness's] crime and Enoch's murder of [the victim]. In Church the two relevant crimes shared actors, and the alleged motive for the second crime was predicated on the occurrence of the first.

Id. at 1497.

In Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991), cited by the court in its analysis, Church's trial attorney earlier had represented a client whom Church wanted to contend was the third robber, instead of Church, in the crime for which Church was being tried. The other client had not been charged with the robbery and the interest of the earlier client of Church's counsel would be that Church remained charged with the robbery, while Church's interest would be that the first client be charged with the robbery, rather than Church.

In the present case, it is unclear whether the petitioner's trial attorney, as city attorney, merely accepted service of process of the complaint and summons, or whether he, in that lawsuit, performed legal services of some type for any of the defendants. Apparently, the civil suit involving Detective Gregory was filed in 1989 and settled several years before the petitioner's first trial. The petitioner did not suggest in his pleadings or present any proof at the evidentiary hearing as to what confidential information his trial attorney could have obtained during the civil rights lawsuit which would have affected or impinged upon his fully cross-examining Detective Gregory. It appears that the petitioner's complaint is based solely upon the fact that Detective Joann Gregory was both a witness at his trial as well as a defendant in the civil matter. There is no claim, and no proof presented, that trial counsel was not zealous in his representation of the petitioner as well as his cross-examination of Detective Gregory. Accordingly, the petitioner failed to establish that his trial counsel had a conflict of interest.

### **III. Failure to Move to Dismiss Indictment Counts Two and Three**

The amended petition for post-conviction relief asserted that trial counsel was ineffective in not moving to dismiss counts two and three of the indictment. According to the petitioner, these counts alleged that the offenses charged therein occurred during the summer of 1989, while "T.C.A. § 39-13-502 did not take effect until November 1, 1989." At the evidentiary hearing, the petitioner testified only briefly about this claim, saying that the indictment numbers referred to in these counts "did not exist at the time of the alleged crime." He said that he had not spoken to trial counsel about the matter, because he did not learn of it until "[m]any years later." Trial counsel was not questioned about this at the evidentiary hearing. The post-conviction court did not specifically rule on the merits of this claim but, instead, instructed that, if the petitioner was complaining of a "typographical or technical error," but was sufficiently notified of the offenses with which he was charged, the claim was without merit, but "if the offense charged in the indictment was not in existence at the time of the offense, such charges could not stand."

We note that Tennessee Code Annotated section 39-2-603, also styled "Aggravated Rape," was in effect at the times that, according to the petitioner, counts two and three alleged that the rapes occurred. Tennessee Code Annotated section 39-13-502, also styled "Aggravated Rape," and which the petitioner says was referenced in counts two and three of his indictment, was contained within Chapter 591 of the Public Acts of 1989, which effected a number of changes to the criminal code, including the renumbering of statutes, and became effective on November 1, 1989.

An indictment that achieves its “overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements.” State v. Hammonds, 30 S.W.3d 294, 300 (Tenn. 2000). In Hammonds, the court explained that an indictment is sufficient to satisfy notice requirements if it “contains allegations that (1) enable the accused to know the accusation to which answer is required; (2) furnish the trial court an adequate basis for entry of a proper judgment; and (3) protect the accused from a subsequent prosecution for the same offense.” Id. at 299 (citing State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997)).

A number of cases subsequent to Hammonds have concluded that a reference in an indictment to the wrong statute number is not a fatal defect if the language is otherwise sufficient. In James R.W. Reynolds v. State, No. M2003-00112-CCA-R3-HC, 2004 WL 1293275, at \*3 (Tenn. Crim. App. June 8, 2004), perm. to appeal denied (Tenn. Oct. 4, 2004), this court found sufficient an indictment that, “[a]lthough the wrong statute was set out in the upper left hand corner, the indictment nonetheless put the petitioner on notice that he was being charged with two counts of aggravated rape for sexually penetrating his six-year-old son and seven-year-old daughter in December 1984 in Coffee County.” Likewise, in Melvin Cofer v. State, No. W2006-00631-CCA-R3-PC, 2007 WL 2781718, at \*6 (Tenn. Crim. App. Sept. 25, 2007), applic. for perm. to appeal filed (Tenn. Nov. 26, 2007), this court upheld the validity of an indictment which referred to the wrong section of the code, explaining that “[a]ll of the parties proceeded with the charge of aggravated vehicular homicide, the issue was never raised by the defendant, and the requirements to sustain a conviction under aggravated vehicular homicide were met.”

Neither in his amended petition nor his testimony at the evidentiary hearing did the petitioner claim that the acts alleged in counts two and three of the indictment were not proscribed at the time by a criminal statute, only that the two indictment counts set out a successor statute, rather than the one applicable at the time. He did not claim that he did not understand what he was alleged to have done in the questioned indictment counts. As we have set out, it is the burden of the petitioner to show both that counsel was defective and that he was prejudiced thereby. He has failed to allege or present any proof that he was prejudiced by the perceived defect in the indictment. Accordingly, we conclude that this claim is without merit.

### **CONCLUSION**

Based upon the foregoing authorities and reasoning, we conclude that the post-conviction court erred in its determination that trial counsel was deficient in not obtaining an expert medical witness to testify at the petitioner’s trial and that the petitioner was prejudiced thereby. His claims are without merit that trial counsel had a conflict as to his representation of the petitioner or that he was prejudiced by the fact that counsel did not move to dismiss counts two and three of the indictment. Accordingly, we conclude that the post-conviction court erred in granting relief. The petition for post-conviction relief is dismissed, the petitioner’s bond is revoked, and he is to be

returned to the custody of the Tennessee Department of Correction to complete service of his sentence.

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ALAN E. GLENN, JUDGE